

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	<b>CG Docket No. 02-278</b>
	)	
<b>Rules and Regulations Implementing</b>	)	
	)	
<b>the Telephone Consumer Protection</b>	)	
	)	
<b>Act of 1991</b>	)	

**OPPOSITION TO THE PETITION OF  
THE AMERICAN RESORT DEVELOPERS ASSOCIATION**

I respectfully submit this Opposition to the Petition filed with the Commission by the American Resort Developers Association (“ARDA”) in regard to the Commission’s Report and Order adopted June 26<sup>th</sup>, 2003. [In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, FCC Rcd., 03-153 (F.C.C. Jul 03, 2003), 68 FR 44144-01.]

The ARDA, in its petition, states: “...the Commission should permit entities to make prerecorded, information-only calls...” and refers to the *opinion* of the Commission on the “...broadcast industry prerecorded call exemption...” The Commission did not act wisely in issuing such an opinion and its detrimental effect is evident from the petitioner’s request. Broadcasters, if relying on the Commission’s opinion, will find themselves facing an opposite opinion in the courts that the TCPA has no such exemption.

The Commission’s own enforcement actions oppose the position taken by the Commission in its July 3, 2003 Report & Order on broadcast industry prerecorded calls. The Commission has issued a dozen citations for prerecorded telephone messages that purportedly are informational (i.e. free, information, tip, introduction, etc.):

1. FCC Citation EB-01-TC-065 - Stones Gym (“free membership”)
2. FCC Citation EB-02-TC-008 - White Rock Athletic (“free membership”)
3. FCC Citation EB-02-TC-048 - Vital Living Products (“tip”)
4. FCC Citation EB-02-TC-064 - Funeral Finders (“free service”)
5. FCC Citation EB-02-TC-065 - Direct Data USA (“free service”)
6. FCC Citation EB-02-TC-131 - Argo Futures (“free investment kit”)
7. FCC Citation EB-02-TC-139 - Michael Miller Insurance (“free information”)
8. FCC Citation EB-02-TC-256 - Silverleaf (“survey call”)
9. FCC Citation EB-02-TC-257 - American Health (“survey call”)
10. FCC Citation EB-02-TC-259 - Newgen (“survey call”)
11. FCC Citation EB-03-TC-017 - Dura-Plex Inc. (“introduction”)
12. FCC Citation EB-03-TC-036 - Warrior Custom Golf Inc. (“free equipment”)

The ARDA suggests to the Commission that information only prerecorded messages are not advertisements. It is ludicrous to suggest that a prerecorded call, which ultimate intent is to further a commercial enterprise, is not a telemarketing call. The Commission has more then enough guidance from legal precedence:

Harjoe v. Colonial Life & Accident Ins. Co., No 01AC-11555 (Div. 35) (Mo. Cir. Ct., May 2, 2002) *So is this material "advertising?" Webster's dictionary defines "advertise" as "to make something known to : notify." This is a pristine example of where the application of the time honored "duck test" is appropriate - "If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck."* *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1337 (11th Cir., 1998).

Advertisement:

1. **Information communicated to the public**, or an individual concerned, as by handbills, newspaper, television, billboards, radio. *First Nat. Corporation v. Perrine*, 99 Mont. 454, 43 P.2d 1073, 1077
2. **Notice given** in a manner designed to attract public attention. *Edwards v. Lubbock County, Tex. Civ. App.*, 33 S.W. 2d 482, 484

See also Robert Biggerstaff's Submission for the Record; *Margulis v. P&M Consulting*, Cause No. 02AC-1268 (Mo. Cir. Ct., Jan 28, 2003) wherein the court held:

As this very Court has previously held, "advertise" in the context of the TCPA means "to make something known to : notify." *Davis, Keller, Wiggins. LLC. v. JTH Tax. Inc.*, No. 00AC-023289 (Mo. Cir. Ct. Aug. 28, 2001), citing Webster's dictionary. The text of the call itself announces:

[A] complimentary vacation package including round trip airfare for two and two nights hotel accommodations to your choice of either Orlando Florida or Las Vegas Nevada. There is absolutely no obligation to purchase or join anything to receive your vacation.

Were this phrase in a magazine or newspaper, it would undoubtedly be considered an "advertisement." The Court holds that the transcript of the call in question meets the definitions of "telephone solicitation" and "unsolicited advertisement" as set forth in the statute.

I have also noted that the preponderance of commenters to the broadcast industry prerecorded calls have stated that such calls are advertisements. I certainly concur with those commenters as such prerecorded information only calls affect the privacy rights of the called party and therefore violate the TCPA.

The Commission, with its opinion, has “opened the door” to the telemarketing industry to claim its illegal prerecorded telephone solicitations fall under a broadcast industry prerecorded call exemption. A reasonable solution would be for the Commission to reverse its opinion and in conformance with the TCPA declare that all prerecorded telephone messages including those advertising a commercial radio or television broadcast and informational calls **which ultimately are intended to further a commercial enterprise** are prohibited by the TCPA.

Consequently, I oppose the petition of the ARDA for their industries prerecorded calls to be considered the same as broadcast industry prerecorded calls and to be exempt from the TCPA. I ask the Commission to deny ARDA’s petition.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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**Certificate of Service:**

I hereby affirm and state that a true and accurate copy of this Opposition to the Petition of the American Resort Development Association was mailed via first class mail, with sufficient postage paid, to the Petitioner:

American Resort Development Association  
1201 15th Street, N.W., Suite 400  
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